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IN THE UNITED STATES DISTRICT COURT  
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

**DAVID CARLTON BROWN,**

Petitioner,

v.

**M. E. POULOS, WARDEN,**

Respondent.

08CV0017 JM (NLS)

**MEMORANDUM OF POINTS  
 AND AUTHORITIES IN  
 SUPPORT OF MOTION TO  
 DISMISS PETITION FOR  
 WRIT OF HABEAS CORPUS**

Date:  
 Time:  
 Courtroom:  
 Mag. Judge: Hon. Nita L. Stormes

**STATEMENT OF THE CASE**

On November 2, 2006, a San Diego County Superior Court jury found Petitioner guilty of furnishing a controlled substance (Health & Saf. Code, § 11352, subd. (a)) and possessing cocaine base for sale (Health & Saf. Code, § 11351.5). (Lodgment 1 (Clerk's Transcript (CT) at 191-192.) The jury found true Petitioner's prior conviction for selling or furnishing a controlled substance (Health & Saf. Code, § 11352), and that he had a prior conviction and served a prison term less than five years prior for assault with a deadly weapon likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)). (Lodgment 1 at 189-190.)

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1 On December 5, 2006, the trial court sentenced him to six years in prison. (Lodgment 1 at  
2 165-166). On January 8, 2006, Petitioner filed a notice of appeal. (Lodgment 1 at 167.)

3 In his appeal, Petitioner raised three claims, one of which he raises as one of four issues in  
4 the current Petition: (1) the trial court erred by denying his motions for mistrial and later for new trial  
5 because he revealed his own custody status to the jury; (2) the trial court erred by permitting him to  
6 assert his right to self-representation at trial because *Faretta v. California*, 422 U.S. 806, 818, 95 S.  
7 Ct. 2525, 45 L. Ed. 2d 562 (1975), was a poorly reasoned decision and should be overturned; and  
8 (3) the trial court erred by staying his prior prison enhancement rather than striking it. (Lodgment  
9 3 (appellant's opening brief).)

10 On February 11, 2008, in a six-page opinion, the California Court of Appeal denied the first  
11 two claims, but the granted relief on the remaining claim and ordered the abstract of judgment  
12 modified to strike the prior prison enhancement. (Lodgment 6.)

13 Petitioner sought further direct review from the California Supreme Court on the remaining  
14 two claims, and his Petition for Review is currently pending before that court. (Lodgment 7;  
15 Lodgment 8.)

16 Additionally, he filed a Petition for Writ of Habeas Corpus in the California Court of Appeal,  
17 which was consolidated with his direct appeal. (Lodgment 9; Lodgment 10.) On February 15, 2008,  
18 the Court of Appeal denied his petition. (Lodgment 11.)

19 Petitioner has also filed three Petitions for Writ of Habeas Corpus in the California Supreme  
20 Court, two of which are currently pending. On February 6, 2007, during the pendency of his direct  
21 appeal, Petitioner filed a Petition for Writ of Habeas Corpus in the California Supreme Court, case  
22 number S150045. (Lodgment 12.) On July 11, 2007, that court denied his petition, citing *In re*  
23 *Dixon*, 41 Cal.2d 756 (1953). (Lodgment 13.) On November 11, 2007, Brown filed a another  
24 petition in the California Supreme Court, case number S157848, which is currently pending.  
25 (Lodgment 14.) On December 24, 2007, Brown filed yet another petition in ///  
26 the California Supreme Court, case number S159365, which is also currently pending in that court.  
27 (Lodgment 15.)

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1 Brown filed the Petition currently pending in this Court on January 2, 2008.

2 **STATEMENT OF FACTS<sup>1/</sup>**

3 On October 15, 2003, San Diego Police Officer William Martinez was engaged in a  
4 "buy-bust" operation with his narcotics team. At approximately 7:00 p.m. he encountered appellant.  
5 The two talked. Eventually, appellant asked Martinez what he was doing in the area. The officer told  
6 appellant he was going for \$50 worth of drugs. Appellant asked if Martinez was looking for rock  
7 cocaine or marijuana. Martinez said rock cocaine, and appellant stated he could assist him in getting  
8 drugs.

9 Using Martinez's cell phone, appellant called friends and arranged for a delivery of the drugs.  
10 The two men went to a second location where they were contacted by a third man in a car. The  
11 officer gave appellant two \$20 bills and one \$10 bill, the serial numbers of which had been recorded.  
12 Appellant got into the car with the third man. After five minutes, appellant returned and gave  
13 Martinez a baggie containing 3.96 grams of rock cocaine. Appellant had a \$10 bill in his hand.  
14 Martinez left the area and gave a signal to arrest appellant.

15 An officer followed appellant, eventually making contact with him. Appellant was with a man  
16 and woman. The woman was found in possession of the \$10 bill Martinez gave appellant for the  
17 drug purchase.

18 The man who provided appellant the drugs furnished to Martinez was placed under arrest.  
19 In his car officers found the cell phone appellant called before the sale.

20 Appellant's defense theory was entrapment.

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26 1. This statement is taken verbatim from the unpublished opinion of the California Court of  
27 Appeal, case number D050139. (Lodgment 6 (*People v. Brown*, 2008 WL 353215, Cal.App. 4 Dist.,  
28 2008).) Additional detail regarding the crime and the evidence at trial, with references to the trial  
record, may be found in the pleadings from direct appeal. (Lodgment 3 (appellant's opening brief);  
Lodgment 4 (respondent's brief).)

1 **ARGUMENT**

2 **I.**

3 **THE CASE SHOULD BE DISMISSED UNDER**  
 4 **THE ABSTENTION DOCTRINE**

5 Federal habeas corpus is generally not available to review issues that are currently pending  
 6 in a state trial court. *See Carden v. Montana*, 626 F.2d 82, 83-84 (9th Cir. 1980) (citing *Younger v.*  
 7 *Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1970)). Unless there are unusual  
 8 circumstances, federal courts should refrain from interfering with state-court trials. *See Santamaria*  
 9 *v. Horsely*, 133 F.3d 1242, 1243-44 (9th Cir. 1998) (en banc) (regarding Double Jeopardy claim),  
 10 amended by 138 F.3d 1280; *Phillips v. Vasquez*, 56 F.3d 1030, 1035-36 (9th Cir. 1995) (holding that  
 11 a fifteen-year delay in a capital case's penalty-phase retrial permitted federal review of the underlying  
 12 guilt-phase conviction).

13 The abstention doctrine also applies when a federal habeas petitioner has a request for relief  
 14 pending in a state appellate court. In *Sherwood v. Tomkins*, 716 F.2d 632 (9th Cir. 1983), the Ninth  
 15 Circuit explained that when "an appeal of a state criminal conviction is pending, a would-be habeas  
 16 corpus petitioner must await the outcome of his appeal before his state remedies are exhausted, even  
 17 where the issue to be challenged in the writ of habeas corpus has been fully settled in the state  
 18 courts." *Id.* at 634. This is so because the state court decision may moot the federal question. *Id.*;  
 19 *see also Stanley v. California Supreme Court*, 21 F.3d 359, 360 (9th Cir. 1994). When a case falls  
 20 within the proscription of *Younger*, a district court must dismiss the federal action. *Roberts v.*  
 21 *DiCarlo*, 296 F. Supp. 2d 1182, 1185 (2003) (citing *World Famous Drinking Emporium, Inc. v. City*  
 22 *of Tempe*, 820 F.2d 1079, 1081 (9th Cir. 1987)).

23 Petitioner has a Petition for Review and two Petitions for Writ of Habeas Corpus pending in  
 24 the California Supreme Court. (Lodgment 7; Lodgment 8; Lodgment 14; Lodgment 15.) Since

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Petitioner is still challenging his conviction in the state courts, this Court should dismiss the current Petition on the basis of abstention.<sup>2/</sup>

### CONCLUSION

For the preceding reasons, Respondent respectfully requests:

1. The underlying petition for federal habeas relief be denied without prejudice; and
2. For any other relief as the Court deems proper.

Dated: April 9, 2008

Respectfully submitted,

EDMUND G. BROWN JR.  
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PETER QUON, JR.  
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/s/ STEPHANIE H. CHOW

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2. Because there have not been final outcomes regarding Brown pending petitions, it is difficult to ascertain at this time whether each of his claims have been exhausted, or will become exhausted. An initial review of Brown's pending petitions in the state supreme court indicate that only Claim One in his current Petition before this Court has been presented to the state courts. Respondent requests to reserve the opportunity to address the issue of exhaustion once Brown's pending petitions in the state courts become final. However, the abstention doctrine permits this Court to resolve the current case at this time.

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Brown v. Poulos**

No.: **08CV0017 JM (NLS)**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On April 9, 2008, I served the attached **NOTICE OF MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS**, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

David C. Brown  
P.O. Box 600  
California Institute for Men  
Chino, CA 91708-0600

*pro-per*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 9, 2008, at San Diego, California.

B. Trigueros

Declarant



Signature

70120154.wpd